Supreme Court, U.S.
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No. 94-47

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN H. CAMPBELL, M.D.,
Petitioner,

v.

SHARLISIA SUTTLE WILLIAMS,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

WILLIAM STANCIL STARNES *
MICHAEL ANTHONY FLORIE
WALTER WILLIAM BATES
LAURA HOWARD PECK
SCOTT MEYERS SALTER
STARNES & ATCHISON
Seventh Floor
100 Brookwood Place
Post Office Box 598512
Birmingham, AL 35259-8512
(205) 868-6000
Counsel for Petitioner

* Counsel of Record

July 6, 1994

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QUESTIONS PRESENTED

1. Whether a state may constitutionally impose an award of punitive damages on one defendant based in part upon the culpability of an unrelated tortfeasor.

2. Whether the non-apportionment of the punitive damages award against Dr. John Campbell violates Dr. Campbell's substantive and procedural due process rights.

3. Whether the non-apportionment of the punitive damages award violates Dr. John Campbell's due process rights by denying him the procedural safeguards guaranteed in *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991).

4. Whether the non-apportionment of the punitive damages award violates Dr. John Campbell's right to equal protection of the laws.

PARTIES TO THE PROCEEDINGS

The petitioner in this proceeding is John H. Campbell, M.D. Dr. Campbell was the Appellant in the Supreme Court of Alabama. Petitioner is hereinafter referred to as Dr. Campbell.

The respondent in this proceeding is Sharlisia Suttle Williams, as Administratrix of the Estate of Lillie Mae Suttle Sumpter, deceased. Ms. Williams was the Appellee in the Supreme Court of Alabama.

The State of Alabama is not a party to this proceeding, but because this proceeding involves a constitutional challenge to a State statute, 28 U.S.C. § 2403(b) may be applicable. The attorney general of the State of Alabama has been served with a copy of this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

John H. Campbell, M.D., petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is not officially reported, but is cited on Westlaw as 1994 WL 46867 (Ala.). The opinion is reprinted in the Appendices at 1a. The ruling of the Circuit Court of Etowah County, Alabama, on Dr. Campbell's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, or, in the alternative for remittitur is not reported. The ruling of the Circuit Court is reprinted in the Appendices at 39a. The ruling of the Supreme Court of Alabama on the petition for rehearing is not reported and is reprinted in the Appendices at 53a.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on February 18, 1984. A timely petition for rehearing was filed on March 4, 1994. The petition for rehearing was denied on April 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

The underlying case arises from the Alabama Wrongful Death Act [codified as § 6-5-410 of the *Code of Alabama* (1975)]. The pertinent part of the Alabama Wrongful Death Act states:

> "A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death."

Ala. Code § 6-5-410(a) (1975).

The purpose of the Alabama Wrongful Death Act is the "prevention of homicide." (App. 14a). The State

seeks to achieve this interest through punishment and deterrence. Accordingly, the Alabama Supreme Court has held that only punitive damages are recoverable in wrongful death actions and that punitive damages are recoverable simply upon a showing of negligence. *Black Belt Wood Co., Inc. v. Sessions*, 514 So. 2d 1249, 1258 (Ala. 1986). Even though the damages assessed are punitive in nature, the Alabama Supreme Court has held that the damages cannot be apportioned among multiple defendants based on their respective culpability, but rather all defendants are jointly liable for the totality of punitive damages assessed against all defendants.[1] *Id.*

The application of this statute to this case arises from the following. On March 9, 1987, Ms. Lillie Mae Sumpter was employed at Gulf States Steel in Gadsden, Alabama. (App. 1a). Ms. Sumpter suffered second and third degree burns on her face and upper body when she was struck by molten steel. (App. 1a). Ms. Sumpter was taken to the emergency room of Holy Name of Jesus Medical Center in Gadsden. (App. 1a). She was admitted to the hospital as the patient of Dr. John Campbell. (App. 1a). Dr. Campbell treated Ms. Sumpter for her burns and monitored her condition. (App. 2a). Dr. Campbell did not intubate Ms. Sumpter and did not examine her airway using a fiberoptic bronchoscope. (App. 2a).

On March 10, 1987, Ms. Sumpter began experiencing respiratory distress. (App. 2a). The attending nurse contacted Dr. Campbell by telephone and Dr. Campbell ordered an immediate intubation. (App. 3a). Attempts at intubation by the hospital staff failed. (App. 3a). Dr. Campbell was called and informed of the situation by the attending nurse. Dr. Campbell ordered the attending nurse

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[1] This Court has held that the Alabama Wrongful Death Act is not unconstitutional simply because it permits recovery of only punitive damages. *See, Louis Pizitz Dry Goods Co. Inc. v. Yeldell*, 274 U.S. 112 (1927). This Court has never considered the questions presented here.

to call an emergency code for any physician in the hospital to immediately perform an emergency tracheostomy. (App. 3a). The attending nurse testified at trial that Dr. Wilfredo Grana responded to the code, but upon arriving in the emergency room stated that he was incapable of performing a tracheostomy. (App. 3a). Dr. Campbell, who had been en route to the hospital, then arrived and performed the tracheostomy. (App. 3a). Unfortunately, Ms. Sumpter suffered respiratory failure prior to the tracheostomy and lapsed into a coma. (App. 2a). She did not recover and died on April 15, 1987. (App. 2a).

On February 17, 1989, Sharlisia Suttle Williams, as Administratrix of the Estate of Lillie Mae Sumpter, filed a wrongful death action pursuant to § 6-5-410 of the *Ala. Code.* (C. 22-36).[2] Dr. Campbell, Holy Name of Jesus Medical Center, and Dr. Grana were named as defendants. The complaint alleged that Dr. Campbell negligently failed to transfer Ms. Sumpter to University Hospital in Birmingham as required by Holy Name of Jesus Medical Center's protocol for the treatment of major burn patients. The complaint also alleged that Dr. Campbell negligently failed to intubate Ms. Sumpter or to examine her upper airway by use of a fiberoptic bronchoscope. (App. 2a). The allegations in the complaint against Holy Name of Jesus Medical Center were, *inter alia,* that the hospital was negligent in its treatment of the deceased and its failure to enforce the hospital's policy regarding admission and transfer of major burn patients. (App. 14a). The complaint alleged that Dr. Grana was negligent in failing to perform a tracheostomy. (App. 14a).

On July 20, 1989, Dr. Campbell filed his answer, denying all material allegations of the complaint. (C. 223-224). He subsequently filed an amended answer, assert-

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[2] The record on appeal in the Supreme Court of Alabama consists of the clerk's record and the reporter's transcript. The clerk's record is cited herein as "C. ——" and the reporter's transcript is cited herein as "R. ——".

ing additional defenses relating to the constitutionality of the Wrongful Death Act. (C. 762-769). In particular, Dr. Campbell pled that the non-apportionment of punitive damages under the Alabama Wrongful Death Act violated the due process clause and the equal protection clause of the Fourteenth Amendment. (C. 763-768).

At the trial of the case, Dr. Campbell testified that he met the standard of care in all aspects of his care and treatment of Ms. Sumpter. (App. 3a). At the close of the evidence, Dr. Campbell filed a motion for separate verdict forms as to each defendant. (C. 862-864). In this motion, Dr. Campbell stated as follows:

> In its amended answer this defendant has respectfully suggested unto the Court that the Alabama Wrongful Death Act is unconstitutional if it is interpreted so as to permit an award of punitive damages against one defendant based upon the conduct of some other defendant or other person for whom the defendant in question is not responsible. To cure this constitutional infirmity this defendant respectfully suggests that the Court should instruct the jury that any damages awarded against this defendant may be based solely upon the culpability of the conduct of this defendant and not based upon the culpability of the conduct of any other defendants or any other person.
>
> WHEREFORE, PREMISES CONSIDERED, this defendant requests this Court to so charge the jury and to provide the jury with verdict forms so as to facilitate the return of a separate verdict against each defendant rather than a joint verdict against all defendants.

The trial court denied this motion. (R. 1516).

Prior to jury deliberations, the trial court instructed the jury as follows in regard to assessing damages under the Wrongful Death Act:

> "In a suit brought for a wrongful death, omission or negligence causing death—and that's to dam-

ages—the damages recoverable are punitive and not compensatory. Damages in this type of action are entirely punitive, imposed for the preservation of human life, and as a deterrent to others to prevent similar wrongs.

The amount of damages should be directly related to the amount of wrongdoing on the part of the defendant. In assessing damages you are not to consider the monetary value of the life of the decedent, for damages of this type, in this type of action are not recoverable to compensate the family of the deceased from a monetary standpoint on account of her death, nor to compensate the plaintiff for any financial or pecuniary loss sustained by her or the family of the deceased on account of her death." (R. 1685).

The jury was then presented with general verdict forms which required the jury to return a single verdict against all defendants who were found liable. (C. 874 and R. 1687-1688).

During jury deliberations, two events occurred which would come to bear on the judgment entered against Dr. Campbell. First, the jury presented the trial judge with the following question:

> "We the jury, are undecided. If found guilty, do we decide if the defendants amount to be paid is broken down or is it one amount?" (S.C. 6).[3]

In response to this inquiry, the trial court replied in the negative and did not allow the jury to apportion damages. Second, while the jury was deliberating, counsel for Dr. Campbell advised the trial court that they suspected Ms. Williams and Holy Name of Jesus Medical Center had entered into a pro tanto settlement. (App. 4a). Counsel for Dr. Campbell requested that the trial court order Ms.

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[3] A supplemental clerk's record was filed in the Supreme Court of Alabama. The abbreviation "S.C. ——" is used to reference cites in this record.

Williams and Holy Name of Jesus Medical Center to reveal this settlement so that the jury could be informed of its terms. (App. 4a). The trial court refused to order Ms. Williams and Holy Name of Jesus Medical Center to reveal the pro tanto settlement. (App. 4a).

The jury returned a verdict against Holy Name of Jesus Medical Center and Dr. Campbell. This verdict was a general verdict against both defendants jointly in the amount of $4,000,000.00. (App. 4a).

After the jury returned the verdict, the pro tanto settlement between Holy Name of Jesus Medical Center and Ms. Williams was revealed. Under the pro tanto settlement, Holy Name of Jesus Medical Center agreed to pay $1,000,000.00 in settlement of the claim against it. (App. 5a). The $1,000,000.00 settlement was set off against the jury verdict and the trial court entered a judgment of $3,000,000.00 against Dr. Campbell. (App. 5a).

On October 23, 1992, Dr. John H. Campbell timely filed a motion for judgment notwithstanding the verdict, or in the alternative for new trial, or in the alternative, for leave from judgment, or in the alternative for remittitur. (C. 884-904). In paragraphs 30, 31, 34, 35, 36, 37, and 39 of Dr. Campbell's motion for new trial, Dr. Campbell renewed the contention that the non-apportionment of punitive damages among multiple defendants under the Wrongful Death Act violates the due process clause of the Fourteenth Amendment and the equal protection clause of the Fourteenth Amendment. (C. 890-895). The trial court denied the post-trial motions of Dr. Campbell on February 19, 1993. (App. 52a). Notice of appeal to the Supreme Court of Alabama was filed on behalf of Dr. Campbell on March 4, 1993. (C. 2465-2474). In his appeal, Dr. Campbell asserted that the Alabama Wrongful Death Act is unconstitutional as applied in cases involving multiple defendants. (App. 5a). The issues of due process and equal protection were

separately addressed and briefed by Dr. Campbell to the Supreme Court of Alabama. (App. 5a).

The Alabama Supreme Court affirmed. In regard to the constitutional challenges, the Supreme Court of Alabama held that "[t]he non-apportionment of punitive damages among multiple defendants in wrongful death cases bears a rational relationship to a legitimate state interest—the prevention of homicide—and it thus does not violate constitutional guarantees." (App. 14a).

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Alabama denied petitioner, Dr. Campbell, the procedural safeguards necessary to satisfy the Fourteenth Amendment. Non-apportionment of punitive damages is fundamentally unfair and constitutionally flawed. The decision of the Supreme Court of Alabama upholding the non-apportionment of punitive damages also violates Dr. Campbell's substantive and procedural due process rights as non-apportionment allows the plaintiff to arbitrarily execute damages against joint tortfeasors without regard to each defendant's culpability. Furthermore, the joint assessment of punitive damages automatically precludes application of the procedural safeguards identified by this Court in *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991). As this Court recently has recognized, those procedural safeguards are imperative because "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co., Ltd. v. Oberg,* 512 U.S. —— (1994). The decision of the Supreme Court of Alabama also denied Dr. Campbell equal protection of the laws by recognizing unreasonable classifications among defendants in cases awarding punitive damages. The decision of the Alabama Supreme Court is in conflict with other state and federal court decisions, and is repugnant to the Fourteenth Amendment of the United States Constitution. Dr. Campbell seeks this Court's review to resolve these

conflicts and to provide him with the constitutional guarantees of the Fourteenth Amendment.

I. JOINT LIABILITY FOR PUNITIVE DAMAGES AMONG MULTIPLE DEFENDANTS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The rudimentary element of due process is fairness. This Court has held that "Due Process" expresses the requirement of fundamental fairness. *Lassiter v. Dept. of Social Services of Durham County,* 452 U.S. 18, 24 (1981). "In its Fourteenth Amendment, our Constitution, imposes on the States the standards necessary to insure that judicial proceedings are fundamentally fair." *Id.* at 33. Procedural due process guarantees an individual "a fair procedure with any deprivation of life, liberty, or property by a state." *Collins v. City of Harker Heights, Texas,* —— U.S. —— (1992), 112 S. Ct. 1061, 1068. This Court has held that in judging a procedure, it must determine whether the procedure "offend(s) those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous crimes." *Rochin v. People of California,* 342 U.S. 165, 169 (1952) (quoting *Malinski v. People of the State of New York,* 324 U.S. 401, 416-17 (1945)).

Nothing is more offensive to the canons of decency and fairness than the non-apportionment of punitive damages among joint tortfeasors. This Court has held that punitive damages are not compensation for injury, but "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Welch,* 418 U.S. 323, 349 (1974). This Court has held that "by definition, punitive damages are based upon the degree of the defendant's culpability." *Massachusetts Bonding & Ins. Co. v. United States,* 352 U.S. 128, 133 (1956). Furthermore, this Court has recognized that "[a]ll punitive legislation contemplates some

relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of everyone." *Felton v. United States,* 96 U.S. 699, 703 (1877). Non-apportionment of punitive damages under the Alabama Wrongful Death Act allows an individual to be punished for acts he did not commit. Even though a defendant may have had no control over the conduct of a co-defendant or did not act in concert with that defendant, he may be punished for that defendant's conduct. Any award of damages against a defendant based upon the conduct of an unrelated tortfeasor violates fundamental notions of justice and fair play. The non-apportionment of punitive damages is contrary to basic principles of fundamental fairness and denies the right to due process.

This Court addressed an analogous situation in *Washington Gas-Light Co. v. Lansden,* 172 U.S. 534 (1899). There, the plaintiff brought an action for libel against a defendant corporation and its agents. During the course of the trial, evidence was admitted, over objection, relating to the capital stock of the corporation and the dividends declared by the corporation. *Id.* at 552. The purpose of this evidence was to give the jury a basis upon which to calculate exemplary damages. *Id.* The trial court did not instruct the jury that this evidence was only admissible for this purpose. *Id.* at 551. The jury did not return separate verdicts against each defendant found liable, but returned a general verdict. *Id.* at 535.

On appeal, the individual defendants contended that evidence of the corporation's wealth was inadmissible against them. *Id.* at 552-553. The individual defendants argued that evidence of the corporation's wealth might affect the amount of punitive damages awarded against the corporation by the jury and should not be the basis for a verdict entered against them. *Id.*

This Court held that evidence of the corporation's wealth was inadmissible as to the individual defend-

ants. *Id.* This Court held that evidence of the corporation's wealth was admitted for the purpose of calculating punitive damages against the corporation and that the trial court should have instructed the jury of this purpose and that the corporation's wealth was not to be considered in assessing damages against the individual defendants. The Court stated that under these circumstances the verdict might be enhanced by the evidence of the wealth of one defendant, but be collected from the defendant that is least culpable and least able to respond. *Id.* at 552. This Court held that "there is no justice in allowing the recovery of punitive damages, in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only." *Id.* at 553.

This Court is now presented with an analogous situation. In wrongful death actions involving multiple defendants, evidence is presented regarding the acts and culpability of each individual defendant. In assessing damages, the jury is instructed that the amount of damages should be directly related to the amount of wrongdoing on the part of the defendant. Yet, non-apportionment of punitive damages requires the jury to return a single verdict against all defendants. Any part or all of this verdict may be executed arbitrarily against any of the defendants found liable, including the defendant that is least culpable. As the jury is not allowed to apportion damages in regard to each individual defendant's culpability, the damages assessed against each defendant are not proportionate to his conduct. Non-apportionment of punitive damages awarded pursuant to the Wrongful Death Act violates each defendant's constitutional right to due process because all defendants risk being punished for the conduct of a co-defendant. The imposition of punitive damages upon one defendant based in part upon the conduct of another defendant is inherently unfair and allows for punishment to be inflicted without regard to culpability. Such an arbitrary imposition of punish-

ment is a denial of substantive and procedural due process rights. Just as a defendant should not have punitive damages imposed upon him based upon another defendant's wealth, neither should a defendant have punitive damages imposed upon him based upon another defendant's culpability.

Non-apportionment of punitive damages among joint tortfeasors is also in conflict with other state and federal court decisions. The majority of states that have addressed the issue of apportionment of punitive damages have held that punitive damages may be apportioned among joint tortfeasors. The leading case in this area is *Embrey v. Holly*, 442 A.2d 966 (Md. 1982). In *Embrey*, the Court of Appeals of Maryland held that in order for punitive damages to be fair and effective, they "must relate to the degree of culpability exhibited by a particular defendant and that party's ability to pay." *Id.* at 973. The court cited *Washington Gas-Light Co. v. Lansden* with approval and stated:

> "Therefore, while a defendant who is least culpable may remain liable for all the compensatory damages suffered by plaintiff, given the purpose of a punitive award, there is no justice in allowing similar recovery of such damages in an action against several defendants based upon the evidence of the wealth and *blameworthiness* of one other than he who must pay the exemplary award." *Id.* at 974 (emphasis added).

The court held that based on the nature of punitive damages, an award of punitive damages should be apportioned between joint tortfeasors. *Id.* at 973.[4]

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[4] *E.g., Coty v. Ramsey Assoc. Inc.*, 546 A.2d 196 (Vt. 1988); *Huckeby v. Spangler*, 563 S.W.2d 555 (Tenn. 1978); *Edquest v. Tripp & Dragstedt Co.*, 19 P.2d 637 (Mont. 1933); *Hall v. Cook*, 400 S.W.2d 39 (Mo. 1966); *Remeikis v. Boss & Phelps Inc.*, 419 A.2d 986 (D.C. 1980); *Shetka v. Kueppers, Kueppers, Von Feldt, and Salmen*, 454 N.W.2d 916 (Minn. 1990); *Mauk v. Brundage*, 67 N.E. 152

Several federal courts have also rendered decisions concerning the apportionment of punitive damage awards. In *Smith v. Lightning Bolt Productions*, 861 F.2d 363 (2d Cir. 1988), the Second Circuit addressed the issue of joint liability for punitive damages. Applying New York law, the court held that joint liability for a punitive damage award is improper. The Second Circuit stated that punitive damages are intended "as a penalty against a defendant who has exhibited a high degree of moral culpability and as a deterrence against further similar conduct by that defendant." *Id.* at 374. The court stated that the purposes underlying an award of punitive damages are defeated if the judgment allows a defendant the "opportunity to escape payment of the penalty assessed." *Id.*[5]

Federal courts have also addressed the issue of joint liability for punitive damages in civil rights claims brought under 42 U.S.C. § 1983. The Second Circuit first addressed this issue in *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983), *cert. denied*, 464 U.S. 961 (1983). In

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(Ohio 1903); *Hotel Riviera, Inc. v. Short*, 396 P.2d 855 (Nev. 1964); *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 542 P.2d 52 (N.M. Ct. App. 1975), *rev'd on other grounds*, 548 P.2d 865 (N.M. 1976); *McCurdy v. Hughes*, 248 N.W. 512 (N.D. 1933); *Louisville & N. R. Co. v. Roth*, 114 S.W. 264 (Ky. 1908); *St. Louis & S. W. Railway Co. of Texas v. Thompson*, 113 S.W. 144 (Tex. 1908); *Thomson v. Catalina*, 271 P. 198 (Cal. 1928); *Fredericks v. Commercial Credit*, 143 S.E. 179 (S.C. 1928); *Shields v. Martin*, 706 P.2d 21 (Idaho 1985); *Freeman v. Sproles*, 131 S.E.2d 410 (Va. 1963); *Smith v. Printup*, 866 P.2d 985 (Kan. 1993); *Rose v. Whitbeck*, 564 P.2d 671 (Or. 1977); *Rubi v. Transamerica Title Ins. Co.*, 641 P.2d 891 (Ariz. Ct. App. 1981).

[5] *E.g., Faison v. Nationwide Mortgage Corp.*, 839 F.2d 680 (D.C. Cir. 1987); *Bosco v. Serhant*, 836 F.2d 271 (7th Cir. 1987); *Fontenot v. Fina Oil & Chem. Co.*, 772 F. Supp. 950 (E.D. Tex. 1991); *Pyramid Condominium Association v. Morgan*, 606 F. Supp. 592 (D. Md. 1985); *Ford Motor Credit Co. v. Hill*, 245 F. Supp. 796 (W.D. Mo. 1965); *see, Loughman v. Consol-Penn. Coal Co.*, 6 F.3d 88, 100-101, n.6 (3d Cir. 1993).

McFadden, the plaintiff brought an action on behalf of her deceased son. The plaintiff claimed that four police officers violated her son's constitutional rights during an attempted arrest and that it resulted in her son's death. *Id.* at 909. The jury assessed $200,000.00 in punitive damages jointly against the four police officers. *Id.* at 910.

On appeal, the police officers argued that it was error for the defendants to be jointly liable for punitive damages assessed in a § 1983 action. The court held that in a § 1983 action, punitive damages should be individually assessed. *Id.* at 914. The court stated that an award of punitive damages in a § 1983 action serves to punish the defendant for denying the plaintiff's rights and serves to deter future violations. *Id.* at 913. The court stated that "[t]he degree of appropriate punishment and the extent to which deterrence may be achieved at an individual's expense are obviously matters appropriate for individualized determination." *Id.* The court went on to state that "[t]he function of punitive damages in section 1983 suits points forcefully toward assessing individually each defendant's liability for such damages and determining an appropriate amount." *Id.* The court stated that a jury so instructed could have found varying degrees of culpability among the defendants and assessed punitive damages accordingly. *Id.* at 914.

In *Davidson v. Dixon*, 386 F. Supp. 482 (D. Del. 1974), *aff'd without opinion*, 529 F.2d 511 (3d Cir. 1975), the court stated that the purpose of punitive damages is to punish the defendant and to deter similar wrongs in the future. The court stated that punitive damages are "imposed for their effect on the defendant" and any benefit to the plaintiff is a windfall. *Id.* at 490.[6]

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[6] Similarly, the Alabama Supreme Court has stated that the plaintiff is not entitled to any compensation in a wrongful death action, but acts as an agent of the State in bringing suit. *Tatum v. Schering*, 523 So. 2d 1042, 1046 (Ala. 1988) (Houston, J., dissenting).

The court held "that each defendant's conduct may be independently evaluated in assessing punitive damages and that separate awards for such damages may be made against different defendants." *Id.* at 489-490. Based on this analysis, the court held that the policy underlying punitive damages is best served when separate awards for punitive damages are made against each defendant.[7]

II. JOINT LIABILITY FOR PUNITIVE DAMAGES ELIMINATES THE PROCEDURAL SAFEGUARDS OF *PACIFIC MUT. LIFE INS. CO. v. HASLIP*

In *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991), this Court concluded that a punitive damage award was not violative of the due process clause of the Fourteenth Amendment.[8] This Court noted three procedural safeguards in the Alabama punitive damages scheme which adequately protect the procedural due process rights of defendants. The jury instructions governing punitive damages, the post-trial review of punitive damage awards, and the appellate review of punitive damage awards by the Alabama Supreme Court were cited as providing defendants procedural protection. *Id.* at 19-23. Non-apportionment of punitive damages under the Alabama Wrongful Death Act eradicates all of these procedural safeguards and allows for punitive damages to be assessed against defendants arbitrarily and without regard to each defendant's culpability.

This Court recently has recognized that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co., Ltd. v. Oberg,* 512 U.S. —— (1994). In *Honda,* this Court stated that judicial

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[7] *E.g., McKinnon v. City of Berwyn,* 750 F.2d 1383 (7th Cir. 1984).

[8] This award was rendered against an insurance agent and an insurance carrier under a respondeat superior theory. It did not represent a joint award based upon the separate conduct of two unrelated defendants as is the case here.

review of the amount awarded is one of the few procedural safeguards that protects against this danger. This Court held that judicial review of the amount awarded is required even when there is a proper jury instruction because there "is the possibility that a jury will not follow those instructions and may return a lawless, biased, or arbitrary verdict." *Id.* at ——. Taken together, this Court's opinions in *Haslip* and *Honda* indicate that an award of punitive damages violates the due process clause unless there are procedural safeguards in the form of proper jury instructions and post-trial judicial review of the amount awarded. Clearly, when a defendant is stripped of these procedural safeguards there is the acute and likely danger that he will be arbitrarily deprived of his property.

Dr. Campbell has clearly been denied the first procedural safeguard, which is a proper jury instruction. The non-apportionment of punitive damages renders the procedural safeguard provided by jury instructions meaningless. Dr. Campbell does not take issue with the instructions concerning the description of punitive damages. The trial court appropriately described the purpose of punitive damages and how the jury was to assess these damages. The trial court appropriately instructed the jury that the damages are "entirely punitive" and that they serve the purposes of punishment and "of protecting the public by deterring the defendants and others from doing such wrong in the future." (R. 1686). Furthermore, the trial court instructed the jury that "the amount of damages should be directly related to the amount of wrongdoing on the part of the defendant" and that "in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in the case and the necessity for preventing similar wrongs in the future." (R. 1685, 1686).

Although these instructions "reasonably accommodated" Dr. Campbell's interest, the jury instruction was flawed

because the "individualized assessment of appropriate deterrence and retribution" was eliminated when the jury was instructed to return a general verdict which operates as a joint and several verdict against all defendants. *Haslip,* 499 U.S. at 20. The procedural safeguards provided in these instructions are vitiated when the jury is instructed to return a general verdict. Although the jury is instructed to make an individualized assessment of damages based on each defendant's culpability, in accordance with the purposes of punishment and deterrence, a verdict is returned that represents the culpability of all defendants. A general verdict which is wholly composed of non-apportioned punitive damages (as this verdict was) cannot be subjected by any appellate court to the "individualized assessment" required by *Haslip, supra.* Moreover, a general verdict allows the plaintiff to execute any of or all of the verdict against any defendant found liable, including the least culpable. Non-apportionment of punitive damages takes rational decisionmaking out of the hands of the jury and places arbitrary decisionmaking in the hands of the plaintiff. An arbitrary assessment of damages is no longer the possibility feared by this Court in *Honda,* but is a certainty. 512 U.S. ——. The defendants lose the procedural safeguard of an individualized assessment of damages provided by the jury and are subject to paying punitive damages for another defendant's culpability.

In the present case, the jury returned a verdict of $4,000,000.00 against Holy Name of Jesus Medical Center and Dr. John Campbell. After the verdict was returned, Holy Name of Jesus Medical Center and Ms. Williams revealed a pro tanto settlement fixing the hospital's liability at $1,000,000.00. Dr. Campbell is now faced with a $3,000,000.00 judgment in punitive damages. This is a judgment not based on an individualized assessment of Dr. Campbell's culpability by the jury. Accordingly, Dr. Campbell was denied the first procedural safeguard of a proper jury instruction.

The second procedural safeguard set out in *Pacific Mut. Life Ins. Co. v. Haslip* is that post-trial review "insures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Id.* at 20.[9] Non-apportionment of punitive damages renders impossible meaningful judicial review of such damages at the post-trial stage. In these proceedings the trial court can consider a number of factors to determine whether a verdict is excessive. *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986). This Court enumerated the following factors which the Supreme Court of Alabama had announced could be taken into consideration in determining whether an award of punitive damages was excessive or inadequate: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the cost of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitiga-

[9] Although the post-trial review and the appellate review of the award of punitive damages against Dr. Campbell did not involve multiple defendants, this was only because Holy Name of Jesus Medical Center entered a pro tanto settlement prior to these stages. It must also be recalled that the verdict which served as a basis for the judgment ultimately entered against Dr. Campbell was in fact a verdict returned against multiple defendants. The issues raised are properly addressed because of the impact joint liability for punitive damages has on the general class of multiple defendants. These issues also impact Dr. Campbell as he could be named as a co-defendant in wrongful death action again. The denial of these procedural safeguards is capable of repetition in other cases involving multiple defendants and must be considered in a constitutional challenge to the imposition of joint liability for punitive damages.

tion; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. *Haslip,* 499 U.S. at 21-22.

In a post-trial hearing in an action under the Alabama Wrongful Death Act, the trial court must consider these factors as to each individual defendant, but then must somehow apply them to a verdict covering all defendants. How can this be done? It is impossible. The reason that it is impossible is because the trial court is permitted to deny remittitur solely because the award is not deemed excessive in light of the culpable conduct of an unrelated joint tortfeasor. The final result is detrimental to the less culpable defendants who may incur the liability of the most culpable defendant. Without this procedural safeguard, there is no longer "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Id.* at 20.

The third procedural safeguard noted by this Court in *Haslip* is the review of punitive damage awards by the Alabama Supreme Court. *Id.* This Court stated that this "provides an additional check on the jury's or trial court's discretion." *Id.* Similar to the analysis concerning post-trial review, the Alabama Supreme Court must consider the above mentioned factors as to each individual defendant, but must apply them to a verdict covering all defendants. Because the non-apportionment of punitive damages among multiple defendants under the Alabama Wrongful Death Act eliminates the procedural safeguards outlined by this Court in *Haslip,* this Court should grant review in this case in order to make clear that the due process clause requires individualized assessment of punitive damages among multiple defendants and will not allow a less culpable defendant to be punished for the culpability of another defendant.

III. NON-APPORTIONMENT OF PUNITIVE AWARDS AMONG MULTIPLE DEFENDANTS DENIES EACH AND EVERY DEFENDANT EQUAL PROTECTION OF THE LAWS

The equal protection clause of the Fourteenth Amendment forbids states to deny any person the equal protection of the laws. The thrust of the Fourteenth Amendment is to insure that all similarly situated persons are treated alike. The equal protection clause is violated when a statute makes an invidious or unreasonable classification.

Joint liability for punitive damages creates an unreasonable classification. The first class is defendants that are held individually liable in wrongful death actions. The second class is multiple defendants that are held jointly liable in wrongful death actions. These classifications are unreasonable in that a defendant's damages, when held individually liable, are assessed in direct correlation to his culpability. Contrary to this, a defendant's damages, when multiple defendants are held liable in a wrongful death action, are not in direct correlation to his culpability.

Pursuant to Alabama law, the jury in a wrongful death case is instructed to assess the amount of damages against a defendant in direct relation to the amount of his wrongdoing. *Black Belt Wood Co., Inc. v. Sessions,* 514 So. 2d 1249, 1258 (1986). When an individual defendant is held liable, the verdict returned against the defendant is based solely on that defendant's culpability. A defendant held liable with other defendants in a wrongful death action is treated differently. Damages are not assessed against each defendant based on individual culpability. This creates an arbitrary and unreasonable classification for multiple defendants that are held liable in wrongful death actions and violates their right to equal protection of the laws.

As the Alabama Wrongful Death Act is social legislation, any challenge to this statute's constitutionality based on the equal protection clause requires analysis under the rational basis test. *Hodel v. Indiana,* 452 U.S. 314, 331 (1981). The general test as to whether a statute is constitutional under the rational relation test is whether under any conceivable set of facts, the statute is rationally related to a legitimate state interest. *Lindsley v. Nat'l Carbonic Gas Co.,* 220 U.S. 61 (1911). The purpose of the Alabama Wrongful Death Act is to punish the wrongdoer and to deter similar wrongs in the future in an effort to preserve human life. Dr. Campbell concedes that the preservation of human life is a legitimate state interest.

The Alabama Wrongful Death Act is unconstitutional because joint liability for punitive damages is not rationally related to the statute's purpose. The Alabama Wrongful Death Act requires the jury to return a general verdict and does not allow the jury to return separate verdicts against each defendant based on his culpability. The plaintiff may execute this verdict against the defendants in any manner he wishes. This arbitrary assessment of punitive damages does not serve the underlying policy of punishment and deterrence. Instead, it allows the plaintiff to assess damages based on each defendant's ability to pay a judgment rather than the defendant's culpability. This allows the defendant that is most culpable the opportunity to escape punishment proportionate to the reprehensibility of his acts. In turn, less culpable defendants are disproportionately punished. This creates a situation in which the most culpable defendants can escape punishment for their guilt while others are punished for acts they did not commit. The policy of punishment is clearly not served.

The Alabama Wrongful Death Act also seeks to preserve human life by assessing damages to deter similar wrongs in the future. Damages awarded on this basis can

only deter future wrongs by a defendant, or others similarly situated, if the damages are based on the reprehensibility of the defendant's conduct and are assessed accordingly. If damages are not assessed against a defendant based on the reprehensibility of his conduct, the penalty imposed will not deter the defendant or others from similar conduct in the future. As discussed, non-apportionment fails to assess damages based on a defendant's conduct.

Non-apportionment is unrelated to the policies of punishment and deterrence underlying awards of punitive damages. In turn, the arbitrary classification created by non-apportionment of punitive damages among multiple defendants is not rationally related to the preservation of human life and denies multiple defendants the equal protection guarantees of the Fourteenth Amendment.

In its decision, the Supreme Court of Alabama held that the non-apportionment of punitive damages is rationally related to the preservation of human life and does not violate the equal protection clause. In rendering its decision, the Supreme Court of Alabama has decided a federal question. Whether non-apportionment of punitive damages violates the equal protection clause appears to be a question of first impression which this Court should review. Furthermore, because of the conflict between the procedure at issue here and the procedure approved by other State and Federal courts, this Court should grant review in order to determine whether the non-apportionment of punitive damages violates the equal protection clause.

CONCLUSION

The Court should grant the Writ of Certiorari to review the judgment and opinion of the Supreme Court of Alabama in *Campbell v. Williams,* No. 1920826, entered February 18, 1994.

Respectfully submitted,

WILLIAM STANCIL STARNES *
MICHAEL ANTHONY FLORIE
WALTER WILLIAM BATES
LAURA HOWARD PECK
SCOTT MEYERS SALTER
STARNES & ATCHISON
Seventh Floor
100 Brookwood Place
Post Office Box 598512
Birmingham, AL 35259-8512
(205) 868-6000
Counsel for Petitioner

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* Counsel of Record